The first judgment of the ECJ regarding a breach of the rule of law in Poland?

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While the judgment in C-619/18 Commission v. Poland is unlikely to deliver a surprise as to the assessment of the Polish ‘reforms’, interesting issues are emerging in relation to the effects of the judgment for the Polish authorities. This piece starts from a brief discussion why the case seems lost for Poland, proceeding then to analysis whether and how the judgment should be implemented.

1. Seeking the logic of the reform of the judges' retirement system

The question of the ‘reform’ of the Polish Supreme Court which is to be decided by the ECJ does not, at first glance, give rise to doubt. The basic problem – the lowering of the retirement age of active judges – is politically sensitive though legally quite straightforward. The Polish Act on the Supreme Court infringed the principle of the irremovability of judges as it shortened the previously prescribed period of exercise by them of their office without a material justification and without a transitional period, depriving 27 judges out of 72 Supreme Court judges their office. However, this change should be seen in a broader context: at the same time the composition of the Supreme Court was increased (to as many as 120 judges) and the manner in which they are appointed was changed by interrupting the term of office of the existing National Judicial Council which stands guard over the independence of judges and elects them. At present, 23 out of 25 members of the National Judicial Council are appointed by the governing majority.

The Act on the Supreme Court, being under verification by the ECJ, grants the Polish President a discretional power to extend the service of a judge on the Supreme Court after she or he reaches the retirement age. This may be done twice, each time for three years, and gives rise to further doubts as to the independence of the Supreme Court. In essence, such regulation makes the possibility of the exercise of judicial powers dependent upon the permission of the executive branch. This exposes judges to the temptation – when faced with retirement – to rule in accordance with the expectations of the President and thus increase their chance of their term of service being extended.

Looking at the entirety of these changes, it is difficult to see any logic in them. Since there is a need to increase the composition of the Supreme Court to 120 judges, then why retire almost 30 of them? In particular those judges who have the most experience and institutional memory? If the proper retirement age should be 65, why

allowing two 3-year extensions of the service? It follows from this that the legislator believes that a Supreme Court judge can easily work until 71 years of age, i.e. in principle just like before the ‘reform’. Why is it that, after the changes, the judge must obtain the consent of the President, when earlier this was not necessary? Why is the President not obligated to act on the basis of objective criteria (e.g. state of health)? The legislator has not given a convincing answer to these questions.

For these reasons one may predict that – just like the Advocate General – the Court of Justice will reach the conclusion that the ‘reform’ of the Supreme Court infringes EU law.

2. Has the potential judgment stating an infringement been already carried out?

More interesting than the outcome of the case itself seems to be the implementation of the possible judgment declaring an infringement. To discuss this implementation, one must go back in time to 19 October 2018. This day the Vice President of the Court granted the Commission’s interim measures against Poland (ultimately the Court granted the Commission interim measures on 17 December). The order of the Vice President obligated Poland, amongst others, to immediately suspend the provisions of the Act concerning forced retirement, suspend the measures adopted in order to apply these provisions, as well as “to take all necessary steps to ensure” that judges could perform their earlier functions in exactly the same way as before the reform.

Initially the Polish government and parliament acted passively, while the Supreme Court and Supreme Administrative Court themselves admitted the removed judges back to service on the basis of the interim order itself. This gave rise to objections on the part of politicians of *Prawo i Sprawiedliwo##,* who stated that this order is not directly effective and must be yet executed by the legislative powers. Facing a *fait accompli* – admission of judges to once again hand down judgments – the Parliament adopted the Act of 21 November 2018 (*Reinstatement Law*). The Reinstatement Law, on the one hand, set aside the provisions challenged by the Commission, while on the other it reversed the effects of their application.

But who was right: the high courts, stating that the provisional interim measures were directly effective, or the government – stating that performance of them required a statute? In this context, it is key to establish who specifically was to carry out these measures. In our view, this issue lies with the national law as part of its institutional and procedural autonomy as an interim decision is addressed to a Member State, and not to a specific authority in that State. As a result, one should deem permissible both the implementation of the order of the Vice President by the Supreme Court and the Supreme Administrative Court which simply admitted the judges to service, and the implementation by the Polish parliament which for this purpose adopted the Reinstatement Law.

After the forthcoming CJEU’s decision in this matter, the question arises, whether Poland will still have to put the judgement into effect or whether – as the Polish

government claims – the judgment has already been implemented. Article 2 sec. 1 of the Reinstatement Law reinstated judges of the Supreme Court and the Supreme Administrative Court who had been retired by virtue of the Act reforming the Supreme Court. The Act deemed their service to have not been interrupted, while those judges who were not interested in returning to active service had the possibility of submitting a declaration to the President. In the same way, Article 2(4) of the Reinstatement Law reinstated presidents of the Supreme Court to their positions. Thus, the Law assumes that the Supreme Court judges effectively retired on the basis of the Law and were then reinstated.

This does not, however, mean that the Reinstatement Law constituted at the same time a correct implementation of a possible judgment of the ECJ declaring an infringement of Article 19(1) TEU. Such a judgment has a declarative character and in this essentially differs from interim measures, imposing on Poland obligations to engage in specific actions. Such a judgment will merely state if a national law stands in conflict with EU law (independent of it) . If the Act on the Supreme Court infringes EU law, the Reinstatement Law, the principle of primacy applies, since Article 19 (1) TEU is an directly effective provision. Hence the elements of the Act on the Supreme Court contrary to EU law cannot be applied by virtue of law. Therefore removing effects of their application is unnecessary. The ECJ states unequivocally that provisions of EU law have effect “in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law”. It is so as the provisions of EU law “must deploy their full effects, in a uniform manner in all Member States, as from their entry into force and throughout the duration of their validity” (*Winner Wetten*, points 53-54).

Essentially, this means that there will be a contradiction between the Reinstatement Law and a possible judgment of the ECJ declaring an infringement of EU law since the content of the Polish Act on the Supreme Court – as contrary to EU law – could not have been applied, the judges did not retire on that basis. Since they did not retire, they could not be reinstated to service. The Reinstatement Law is thus in this part at least legally ineffective.

It could thus seem that the proper route for the Polish legislative to take, in the event that Poland loses the proceedings before the ECJ, is to set aside parts of the Reinstatement Law and accept that the high court judges continue their tenure by virtue of EU law itself. However, such an approach appears excessively formalistic. The Law, in this scope, has already had its effects in the period before the issuing of the judgment and after the issuing by the ECJ of the interim measures which justified its issuance. Of course, in this period also the Act on the Supreme Court could not be applied by virtue of the principle of primacy – it remained however the subject of a dispute between the Polish government and the Commission, while adoption of the Reinstatement Law allowed for an actual securing of the resolution of that dispute by the ECJ.

To sum up, we believe that in reality the judges of the Supreme Court, and of the Supreme Administrative Court, who did not express such a will, did not retire, the Reinstatement Law could not therefore reinstate them to service and was in this regard legally ineffective. It had however factual effects, and the fact itself that they

have reached their full realization (the reinstatement was a one-off event) means that there is no need to abrogate its provisions.

On the other hand, we do not agree with the arguments of Poland that the judgment became irrelevant and without purpose. There is no need to repeat here the argumentation raised in the opinion of the Attorney General and the blogs.

In any event, on the day the CJEU's implementation deadline lapsed, Poland did not remove the infringement, and the removal of the infringement in execution of interim measures does not guarantee that it will be a permanent removal. The practice of law-making in Poland under the *Prawo i Sprawiedliwo##* government shows that even acts concerning the most elementary institutions of the state may be adopted in a couple of days or at night, as evinced by acts on the Constitutional Tribunal or a recent reform of the Criminal Code regarding paedophilia.

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